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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 21, 1998

Federal Communications Commission
ATTN: Secretary
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: CC Docket No. 97-241
The Public Utility Commission of Oregon's Comments

Enclosed are the Reply Comments of the Public Utility Commission of Oregon (OPUC) explaining why the Federal Communications Commission should deny the petition for preemption filed by Lincoln County and the Economic Development Alliance of Lincoln County (EDA).

Sincerely,

A handwritten signature in cursive script, appearing to read "Mike Weirich".

Michael T. Weirich
Assistant Attorney General
Public Utility Section

MTW:mtw:ras\MTW0897.LTR

c: Ron Eachus, OPUC (w/Encl.)
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Enclosures

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1 Before the
2 **FEDERAL COMMUNICATIONS COMMISSION**
3 Washington, D.C. 20554

4 Petition of
5 Lincoln County, Oregon, and the
6 Economic Development Alliance of
7 Lincoln County, a non-profit corporation,
8 for Declaratory Ruling and Preemption
9 Pursuant to Section 253 of the
10 Communications Act of 1934
11 of Certain Provisions of the Oregon
12 Telecommunications Utility Law

)
) CC Docket No. 97-241
)
)

) THE PUBLIC UTILITY
) COMMISSION OF
) OREGON'S REPLY IN OPPOSITION
) TO PETITION
)

10 **INTRODUCTION**

11 The Public Utility Commission of Oregon (OPUC) replies to the opening comments filed
12 by Lincoln County and the Economic Development Alliance of Lincoln County (together
13 "Petitioners").

14 Preliminarily, the OPUC observes that the Petitioners devote several pages of their
15 Comments to an explanation of the hoped-for benefits of their CoastNet telecommunications
16 project. See Petitioners Comments at 2-4. The OPUC reiterates that it is not "against" the
17 CoastNet project. Indeed, the OPUC would be favorably inclined, upon proper application, to
18 grant each CoastNet participant a certificate of authority ("Certificate") as a telecommunications
19 provider so that the project may quickly proceed.

20 The unfortunate fact is that the Central Lincoln People's Utility District (CLPUD), the
21 key CoastNet participant who is providing the network capacity and other services for the
22 project, has declined to apply for a Certificate or to participate in the present proceedings before
23 the Federal Communications Commission (FCC). Thus, the applications were denied because
24 the Petitioners intend to lease and resell telecommunications services from the CLPUD, an
25 uncertified telecommunications services provider. Granting the Petitioners' applications under
26 these circumstances would violate Oregon law, as well as insulate the CLPUD, the network

1 capacity provider, from accountability and responsibility for service quality over its network,
2 to the detriment of the public safety and welfare.

3 4 ARGUMENT

5 6 1. Certification is a benefit, not a burden.

7
8 The Petitioners first argue that Oregon's certification requirement "creates unnecessary
9 burdens and impediments upon those attempting to enter and compete in the intrastate and
10 interstate telecommunications markets." Petitioners Comments at 1, lines 15-18. Petitioners are
11 incorrect.

12 The OPUC welcomes all persons who desire to enter and compete in the
13 telecommunications market in Oregon. Indeed, the OPUC makes every effort to certify those
14 who apply. The OPUC has streamlined the certification process, and routinely grants
15 applications for certification. In fact, since the passage of the Telecommunications Act of 1996,
16 the OPUC is not aware that it has denied any applications for certification, other than the present
17 ones.

18 Certification is viewed by both the applicant and the OPUC as a positive thing. The
19 advantages of certification to the applicant include enabling it (1) to enter into interconnection
20 agreements, (2) to purchase unbundled network elements ("building blocks" in Oregon), and (3)
21 to enter into agreements to purchase telecommunications services for resale at a wholesale
22 discount. *See generally* 47 U.S.C. § 251; 47 C.F.R. Part 51.

23 The advantages to the OPUC from certification are that the OPUC knows (1) who is
24 providing the service, (2) who is responsible for service problems, (3) who is responsible for
25 fixing service problems, and (4) who may be responsible for universal service contributions.

26 \\\

1 The Telecommunications Act of 1996 contemplates State certification of carriers.
2 Section 252(e)(3) permits the State to require and enforce service quality standards when
3 adopting an interconnection agreement. 47 U.S.C. § 252(e)(3). Section 253(b) permits the State
4 to impose, on a competitively neutral basis, requirements necessary to preserve and advance
5 universal service, protect the public safety and welfare, ensure the continued quality of
6 telecommunications services, and safeguard the rights of consumers. *See* 47 U.S.C. § 253(b).

7 The OPUC's purposes for certifying telecommunications providers are consistent with
8 those permitted by the 1996 Act and are lawful. *See also* 47 U.S.C. § 261(b) and (c).

9
10 **2. The Petitioners' description of the CLPUD's participation as "leasing**
11 **dark fiber" is incorrect. The CLPUD is leasing network capacity, and has**
12 **retained the responsibility to ensure its network functions properly.**

13 The Petitioners describe the terms of their agreement with the CLPUD as a lease of the
14 CLPUD's "dark fiber." Petitioners Comments at 2-3. However, the label "dark fiber" as used
15 by Petitioners in their submissions to the OPUC is not the same as the definition of the term it
16 now provides to the FCC. Rather than rely upon a label to describe the CoastNet project, the
17 FCC should carefully review the Petitioners' applications and subsequent submissions.

18 The Petitioners describe "dark fiber" as "the provision of fiber optic lines without the
19 necessary electronic equipment to power the fiber" as compared to "lit fiber" which the
20 Petitioners describe as "fiber which includes the electronic and other equipment necessary to
21 power or 'light' the glass fiber." *See* Petitioners Comments at 2, footnote 1. The Petitioners
22 then broadly label their application to the OPUC, and their contract with the CLPUD, as a lease
23 of dark fiber. *Id.* at 2-3.

24 However, the Petitioners' applications to the OPUC, as well as their contract with the
25 CLPUD, reveal that the CLPUD is not leasing actual fiber optic lines at all, lit or unlit. As
26 discussed earlier, the CLPUD is leasing its *network capacity* to the Petitioners. *See* OPUC

1 Comments at 3, 5 and accompanying Attachment B (the contract between Petitioners and
2 CLPUD). Further, the CLPUD retains responsibility for maintaining its network, and for fixing
3 problems which occur on its network. *Id.*

4 Thus, this matter does *not* involve an abstract issue about the legal requirements
5 surrounding the lease of an unlit fiber optic line. The FCC should decide the Petitioners'
6 petition based upon the actual facts surrounding the provisioning of its CoastNet project, not
7 upon the Petitioners' inappropriate and incorrect short-hand description "lease of dark fiber."

8
9 **3. Under State law, each of the CoastNet participants is a
telecommunications services provider.**

10
11 The Petitioners argue that neither they, nor the CLPUD, require certification under ORS
12 759.020. *See* Petitioners Comments at 5. The OPUC previously addressed this issue. Applying
13 the OPUC's interpretation of Oregon law to the specific facts of the Petitioners' applications and
14 subsequent filings, the CoastNet participants would each be providing telecommunications
15 services, and thus each requires a Certificate from the OPUC. *See* OPUC Comments at 7-9.

16
17 **4. The Petitioners' applications do not present the issue of whether each
owner of each network element must be certified.**

18
19 The Petitioners inappropriately attempt to raise the OPUC's decision denying their
20 applications to one which carries greater implications. The Petitioners assert that, in denying
21 their particular applications, the OPUC declared it would "subject to regulation each owner of
22 each component part of a telecommunications network." Petitioners' Comments at 5, lines 10-
23 11; at 9-10 (citing to Order No. 97-373 at 7). The Petitioners are wrong.

24 The OPUC made no grand declaration about the relationship between network elements
25 (building blocks) and the certification requirements of ORS 759.020. Rather, the OPUC
26 reviewed the particular facts of the Petitioners' applications, and subsequent filings, under

1 Oregon's law defining a "telecommunications service." The OPUC's Order No. 97-373 has
2 precedential value to those who propose a project under factual circumstances identical, or very
3 similar, to those presented by the Petitioners.

4 Further, it is likely that both the CLPUD's and the Petitioners' *stated activities* would
5 constitute the provision of a telecommunications service under the Telecommunications Act of
6 1996. *See* 47 U.S.C. § 153(48), (49), and (51).

7
8 **5. The FCC has stated that a State's limitations of powers to a political
subdivision, like the CLPUD, is not a Section 253 "barrier to entry."**

9
10 The Petitioners assert, on behalf of the CLPUD, that the CLPUD cannot apply for a
11 certificate in its own right "apparently...for policy reasons internal to the PUD, and also because
12 there is some question as to whether the PUD has the legal power to engage in
13 telecommunications services." Petitioners Comments at 5, footnote 6.

14 Again, anything to do with the CLPUD remains unclear, because the CLPUD has not
15 participated in the OPUC proceedings or in the present FCC proceeding. However, assuming
16 the CLPUD is prohibited by State law from applying for a certificate to provide
17 telecommunications services, the FCC has stated that such a State legal limitation does not
18 constitute a "barrier to entry" under Section 253. *See In re Petition of Texas Telecommunication*
19 *Law*, CCB Pol 96-13, 96-14, 96-16, and 96-19, FCC Order 97-346 (9/27/97) at Paragraphs 179-
20 190. Likewise, a denial of the Petitioners' applications, arising from the legal limitations of the
21 CLPUD which is providing and maintaining the network capacity which the Petitioners propose
22 to lease and resell, is not a "barrier to entry" to the Petitioners under Section 253.

23 Additionally, to the extent the CLPUD has any unidentified "policy reasons" for not
24 applying for a Certificate, it must necessarily yield to the OPUC's previously-specified public
25 policy purposes for requiring certification.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of January, 1998, I served the foregoing PUBLIC UTILITY COMMISSION OF OREGON'S REPLY IN OPPOSITION TO PETITION upon the following persons by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

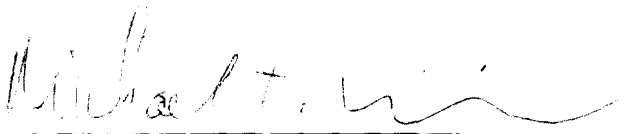
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